

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
THE NEW YORK CITY DISTRICT COUNCIL OF  
CARPENTERS PENSION FUND, NEW YORK CITY  
DISTRICT COUNCIL OF CARPENTERS WELFARE  
FUND, NEW YORK CITY DISTRICT COUNCIL OF  
CARPENTERS VACATION FUND, NEW YORK CITY  
DISTRICT COUNCIL OF CARPENTERS ANNUITY  
FUND, NEW YORK CITY DISTRICT COUNCIL  
OF CARPENTERS APPRENTICESHIP, JOURNEYMAN  
RETRAINING, EDUCATIONAL AND INDUSTRY  
FUND, NEW YORK CITY DISTRICT COUNCIL OF  
CARPENTERS CHARITY FUND, and THE NEW  
YORK CITY AND VICINITY CARPENTERS LABOR  
MANAGEMENT COOPERATION FUND, by MICHAEL  
J. FORDE, and PAUL O'BRIEN, as TRUSTEES,

07 CV 4646 (JGK)  
ECF CASE

**AFFIDAVIT OF COUNSEL  
IN SUPPORT OF ORDER  
TO SHOW CAUSE**

Plaintiffs,

-against-

E&S CONSTRUCTION CORP.,

Defendant.

-----X  
STATE OF NEW YORK     )  
                                  ) ss:  
COUNTY OF NEW YORK    )

ANDREW GRABOIS, Esq. being duly sworn, deposes and says,

1. I am associated with the firm of O'Dwyer & Bernstein, LLP, attorneys for plaintiffs ("Funds") in the above captioned action. I am familiar with all the facts and circumstances in this action.
2. I submit this affidavit in support of plaintiffs' application for an order directing E&S Construction Corp. ("Defendant") to show cause why a default judgment should not be entered in favor of plaintiffs, confirming an arbitration award against the Defendant, dated April 2, 2007.

3. Upon information and belief Defendant is a corporation and not an infant, in the military or an incompetent.

4. Subject matter jurisdiction of this action is based upon Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. §185, Sections 502(a)(3)(B)(ii), (d)(1), (e) and (g) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§1132(a)(3)(B)(ii), (d)(1), (e) and (g), Section 515 of ERISA, 29 U.S.C. §1145, and Section 9 of the Federal Arbitration Act, 9 U.S.C. §9. Personal jurisdiction is based upon Section 502(e)(2) of ERISA, 29 U.S.C. §1132(e)(2).

5. Plaintiffs brought this action to compel the production of Defendant's books and records pursuant to a collective bargaining agreement ("Agreement") between the Defendant and the District Council for New York City and Vicinity, United Brotherhood of Carpenters and Joiners of America.

6. Defendant has failed to furnish these records for the purpose of conducting an audit to ensure compliance with required benefit fund contributions as required under the Agreement.

7. Pursuant to the arbitration clause of the Agreement, the dispute was submitted to arbitration to Robert Herzog, the duly designated impartial arbitrator. Thereafter, upon due notice to all parties, the arbitrator held a hearing and rendered his award, in writing, dated April 2, 2007 determining said dispute. (A copy is annexed hereto as Exhibit "A"). Upon information and belief, a copy of the award was sent to the defendant.

8. The arbitrator found that E&S Construction Corp. had failed to comply with the Agreement as it relates to paying fringe benefit monies and directed it to furnish the Plaintiffs with any and all books and records, for the period of February 23, 2006 through April 2, 2007

including but not limited to, the cash disbursement section of the cash book, general ledger, job location records, daily time records and all certified payrolls.

9. The arbitrator also found that E&S Construction Corp. was required to pay the funds a total sum of \$2,350.00 pursuant to the Agreement, representing costs incurred in the arbitration.

10. The defendant paid the funds a total sum of \$2,350.00, but has failed to abide by the section of the award seeking the production of books and records for the period of February 23, 2006 through April 2, 2007.

11. The award has not been vacated or modified and no application for such relief is currently pending or has been made.

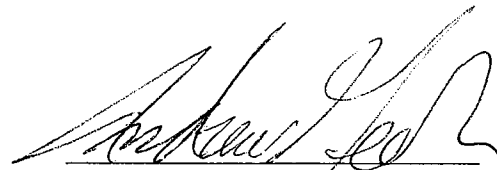
12. Plaintiffs commenced this action on June 1, 2007 by filing a summons and complaint. (A copy is annexed hereto as Exhibit "B"). Plaintiffs subsequently served the summons and complaint together with the Judge's rules upon Defendant by delivering two (2) true copies of the same to the Secretary of the State of New York on June 7, 2007, pursuant to Section 306(b) of New York Business Corporation Law and an affidavit of service was filed with the Court on June 11, 2007. (A copy is annexed hereto as Exhibit "C").

13. This action is timely as it was filed within one year statute of limitations applicable to a petition to confirm an arbitrator's award.

14. Defendant has failed to answer or appear or move with respect to the complaint and the time to do so has expired. (A copy of the Clerk's Certificate is annexed hereto as Exhibit "D").

15. Plaintiffs seek a default judgment against Defendant and in favor of plaintiffs as follows:

- a. confirming the arbitrator's award;
- b. ordering E&S Construction Corp. and its officers to make available to the Plaintiffs or authorized representatives any and all books and records deemed necessary to conduct an audit including, but not limited to, the cash disbursement section of the cash book, general ledger, job location records, daily time records and all certified payrolls for the period February 23, 2006 through April 2, 2007.
- c. attorneys' fees and costs arising out of this action as determined by the court. (An Affidavit of Services is annexed hereto as Exhibit "E" and a proposed Default Judgment is annexed hereto as Exhibit "F");
- d. such other and further relief as this Court may deem just and proper;



ANDREW GRABOIS (AG 3192)

Sworn to before me this  
26<sup>th</sup> day of July, 2007



NOTARY PUBLIC

**NICHOLAS HANLON**  
Notary Public, State of New York  
No. 02HA6167368  
Qualified in Westchester County  
Commission Expires May 29, 2011